BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-262
	)	
Tier Buy-Through Prohibitions	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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SUMMARY

TCI is planning to implement a voluntary early implementation program on April 1, 1993 designed to eliminate barriers to anti-buy-through. TCI subscribers will be able to purchase the basic tier service and pay programming without any technical or other impediments which to date have required the purchase of additional programming. TCI's plan involves elaborate reconfiguration customized for nearly each TCI system and thus is not intended as an appropriate industry wide solution.

Congress had one clearly targeted goal in enacting the tier buy-through prohibition: to end the identified practice of some systems which tied the sale of pay channels to the purchase of upper tier programming. The "discrimination between subscribers" provision is designed to reach the same target: to ensure that cable operators cannot use rates to coerce subscribers into purchasing upper tier programming in order to receive per channel or pay programming. The Commission should not look to construe the section more broadly than the plain legislative intent. The Commission's rules should therefore not overreach so as to inhibit the efficient packaging of services for subscribers who desire multiple channels or services at a discount.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), hereby files its comments in the above-captioned proceeding.[1] TCI, through its operating subsidiaries, is a multiple systems operator providing cable service in 49 different states to approximately nine million subscribers. TCI is thus an interested party to this proceeding.

INTRODUCTION

The instant proceeding will promulgate rules to govern the elimination of technical and other impediments which have to date required cable subscribers to purchase expanded basic tiers in order to purchase premium programming, so-called

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[1] Notice of Proposed Rulemaking in MM Docket No. 92-262, FCC 92-540 (rel. Dec. 11, 1992)("Notice").

"buy-throughs." The promulgation of such rules is required by §3(b)(8) of the 1992 Cable Act.[2] TCI fully supports the goals embodied in §3(b)(8) which promote greater consumer choice while preserving cable operators' marketing flexibility. In fact, TCI plans to expedite deployment of technology that will offer TCI's customers this greater choice well ahead of the 10-year deadline established by the Act. TCI subscribers will be able to purchase the basic tier service and pay programming without the technical or other impediments which to date have required the purchase of additional programming. This approach is set forth in detail in Section I, below. In the remainder of the pleading, TCI addresses other issues raised in the Notice surrounding the "discrimination between subscribers" language contained in the second sentence of §3(b)(8). As explained there, TCI believes that a reasonable construction of the statutory provision permits, at the discretion of the cable system, a wide range of retail offerings including a la carte pricing, attractive and efficient packages of programming, and promotional pricing.

I. TCI WILL SUPPORT THE NEW POLICY BY EARLY VOLUNTARY IMPLEMENTATION.

Before addressing the legal and policy issues raised by the instant proceeding, TCI first wishes to describe on the record its planned course to help promote the underlying policy of the anti-buy-through provision. Using existing

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[2] The section will be codified at 47 U.S.C. §543(b)(8) (amending §623 of the Communications Act of 1934, as amended).

non-addressable technology, TCI is planning to implement a program designed to eliminate the technical barriers to anti-buy-through on April 1, 1993, contemporaneous with the promulgation of FCC buy-through rules and ten years before the final implementation required by the statutory deadline.

To achieve this self-imposed goal, TCI will deploy a combination of steps, including where necessary reconfiguration of its channel lineups so as to group the must-carry stations, as well as any public, educational and government access channels, on adjacent frequencies together in the lower band. A variety of traps and other security methods will be used to disable/enable access to other programming, as appropriate. While almost every system will require its own reconfiguration, TCI is undertaking these efforts so that TCI customers taking basic service will not be required to buy-through additional levels of service to take pay channel or pay-per-view programming.[3]

TCI's plans can provide an efficient and expeditious means of implementing the underlying policies for nearly all of its systems. Certain qualifications must be stated, however. First, the design set forth necessarily assumes that cable operators are free to place certain must-carry stations in an off-channel position, that is, those stations whose on-air channel position is a number which exceeds the actual number of basic tier channels carried on the system. The Commission has

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[3] In isolated cases, one or more pay services may not be immediately available due to technical impediments.

specifically proposed this exception in its Must Carry Proceeding[4] and its actual adoption is imperative to the implementation of this plan, and thus also to the early facilitation of the anti-buy-through policies. Second, TCI's plan assumes that the Commission's implementation of the Cable Act of 1992 will necessarily preempt local franchise requirements to carry a "basic" tier in excess of the federally-mandated tier (i.e., must-carry and PEG). Again, absent this condition, the program cannot realistically work.[5] Finally, TCI notes that in a minority of cases, a TCI system may be so small as to make infeasible the implementation of this plan. Such exception is however consistent with Commission observations elsewhere that small systems may warrant separate analysis and treatment.[6] With these limited and reasonable qualifications, TCI is prepared to undertake its implementation of the described program.

TCI is acting on its own in advance of any requirements the Commission may adopt and by no means intends to suggest that this particular approach is one which should be required by the

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[4] Notice of Proposed Rulemaking in MM Docket 92-259, FCC 92-499 (rel. Nov. 19, 1992) at ¶ 33.

[5] Of course, it is entirely reasonable to view such local requirements as themselves a sort of "buy-through" or bundling requirement at odds with the new federal policy, and preempted on this ground alone.

[6] See Notice of Proposed Rulemaking in MM Docket 92-266, FCC 92-544 (rel. Dec. 24, 1992) at ¶¶ 128-133 (proposing to exempt small systems)("Rate Regulation Notice"). See also Notice at 6 ("cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's 10 -year exemption").

Commission. Plainly, maximum flexibility for cable operators is intended by Congress and should be assured by the Commission's rules as well. In light of TCI's plans, TCI will not comment on the technical, timing and other implementation issues raised in the Notice. The remainder of these comments will focus on the underlying policies underpinning the section, including especially the appropriate construction of the discrimination provision with respect to packaging of tiers and/or individual channels.

II. THE BUY-THROUGH PROHIBITION IS NARROWLY DESIGNED TO PROHIBIT A SPECIFIC PRACTICE.

The Notice asks a series of questions regarding the scope of permissible marketing and packaging activity left intact by the statute. In order to answer these questions accurately, the Commission must first analyze and fully understand the policy and concerns underlying the prohibition.

Congress had one clear goal in enacting the buy-through prohibition rules of §3(b): to end the identified practice of some systems which tied the sale of pay channels to the purchase of upper tier programming. Congress intended to promote customer choice, whenever possible, enabling subscribers to select more readily and freely among programming services. Recognizing the potentially substantial technical impediments to implementation of this goal, Section 3(c) sets out a fairly detailed schema to permit the technological changes to be done on a rational and cost-efficient basis. It is also critical to note what Congress did not do: it did not require systems to transform their

offerings to a la carte pricing (though it provided incentives to do so), nor did it prohibit tiering and other kinds of packaging.

The straightforward goal of ending the tying of pay channels to upper tier programming is fully revealed by two sentences in §3(b)(8)(A). The first sentence provides the outright prohibition:

> A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis....

When introducing the House bill, H.R. 4850, the prohibition was explained by sponsor Representative Markey. Describing the anti-buy-through provision as a "consumer protection" section, designed to address an "unfair practice[]," he explained:

> An anti-buy-through provision permits consumers to buy premium program services such as HBO, without being forced to purchase any other tier other than basic service.[7]

The remainder of Section 3(b)(8)(A) is supportive of this narrowly targeted purpose. The second sentence of §3(b)(8)(A) precludes through the indirect means of pricing what the first sentence prohibits directly: "A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video

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[7] Statement of Rep. Markey, 138 Cong. Rec. E1034. See also 138 Cong. Rec. S14608 (Statement of Senator Inouye)("The purpose of this provision is to increase options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programming").

programming offered on a per program or per channel basis." Recognizing that cable operators could design prices in such a way as to effectively achieve a tying arrangement, Congress sought to foreclose this avenue. Therefore, the second sentence should be understood as a supplemental means of achieving the specific objective set forth in the first sentence of §3(b)(8)(A).

The Notice appears to suggest that Section 3(b)(8) can, or possibly even should, be read more ambitiously to inhibit any packaging. This suggestion is untenable. While Congress plainly exhibited a view that the unbundling of cable channels would in general promote consumer welfare, this view by no means extended to action inhibiting or prohibiting the efficient packaging of services. The language of the Senate Report regarding the consumer benefits of unbundling, which is specifically quoted by the Notice, cannot be read otherwise.[8] In fact, that language did not relate at all to buy-through practices, which were not even addressed by any provision of S.12. Rather, the Report's discussion occurs as an explanation of why the Senate bill (like the Conference bill ultimately enacted) would exempt entirely from regulatory scrutiny the

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[8] The cited language provides:

> [t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire.

S. Rep. No. 102-92, 102d Cong., 2d Sess. (1992) at 77.

offering of pay programming. Indeed, the limited criticism of bundling related to programmers' insistence upon being carried on a particular tier, and plainly not to the provision ultimately enacted in §3(b)(8)(2). Moreover, the Senate bill, unlike the actual legislation, proposed to have the FCC apply, as one of the factors to be considered in judging the reasonableness of cable programming rates, "the extent to which service offerings are offered on an unbundled basis."[9] Again, the Senate proposed an incentive, but not a requirement to unbundle. While the quoted language plainly reflects the Senate Committee's belief that unbundled offerings could benefit consumers, it cannot be read as a Congressional sanction against packaging.

The underlying policy of the section is, unsurprisingly, evident from its very language: it is designed to eliminate a specific practice of requiring cable customers who wish to buy pay programming to also purchase expanded basic against their will. It need not and should not be read to foreclose cable operator freedom to create and offer new marketing arrangements. As discussed below, sound public policy equally supports this construction.

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[9] S. 12, 102nd Cong., 2nd Sess. §5(c)(3)(A) (1992).

III. THE DISCRIMINATION PROVISION IS CONFINED TO KEEP OPERATORS FROM COERCING SUBSCRIBERS TO PURCHASE UPPER TIER PROGRAMMING IN ORDER TO PURCHASE PAY CHANNELS.

The Notice suggests, by way of a series of questions, that the discrimination language of the second sentence of §3(b)(8)(A) may have broad application. Consistent with the limited scope of the section, the Commission should interpret the second sentence in §3(b)(8)(A) to mean that cable operators cannot use rates to coerce subscribers into purchasing upper tier programming in order to receive per channel or pay programming, but otherwise remain free to package and market in a variety of ways at their discretion.

The Commission only recently affirmed in a different context the pro-consumer benefits of packaging. In Bundling of Cellular Customer Premise Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992) ("Cellular Bundling"), the FCC rejected arguments that it would be appropriate to interfere with entrepreneurial choices to package services and goods. The Commission found that packaging can be an efficient means of reducing transaction costs and otherwise attracting new customers.[10] In Cellular Bundling, the Commission stated:

> ...bundling is an efficient promotional device which reduces barriers to new customers and which can provide new customers with CPE and cellular service more economically than if it were prohibited.[11]

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[10] Id. at 4030-31.

[11] Id. at 4030.

The Supreme Court has similarly found that the antitrust prohibitions against tying should not be read to disrupt efficient marketing practices: "Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively...." Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12 (1984). Provided that consumers are not forced to buy a product they "either did not want at all, or might have preferred to purchase elsewhere on different terms,"[12] packaging is benign. Indeed, packaging can promote consumer welfare by facilitating new entry, reducing costs through capturing of distribution and servicing efficiencies, and enabling and encouraging the development and deployment of new technologies. See generally, R. Bork, The Antitrust Paradox 375-81 (1978).

There is no basis for assuming that Congress objected to cable operators capturing these benefits and passing them along to subscribers who desire multiple channels or services. Promotions, discounts, or incentives offered by cable operators in order to share efficiencies in distribution and servicing or to promote new or expanded subscribership and thereby reduce overall costs should remain free of the rules' operation. Provided such packaging does not coerce basic subscribers into purchasing an upper tier of programming in order to receive per

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[12] Id.

channel or per program channels, it should be considered lawful under §3(b)(8)(A).

Two examples of non-coercive incentives and discounts are multi-pay discounts and value packages. Both of these approaches enable the cable operator to pass along to and share with its customers the efficiencies of delivering multiple services to one residence. While the pay services are still available individually, at the same stand-alone price to all subscribers, discounts for multiple channel subscriptions are also available. Allowing consumers to choose between buying products separately or buying the combination at a discount is clearly lawful and efficient.[13]

A multi-pay discount may offer subscribers to purchase one pay channel at a cost of $10/month but two pays are discounted to $17. This is plainly permissible because multi-pay discounts do not distinguish between basic and upper tier subscribers, and thus are uncontrovertedly outside the reach of the second sentence of (b)(8)(A).

Value packages, which offer similar discounts for the offering of pay programming and basic and/or expanded basic programming, should be viewed as equally pro-consumer. For example, a $10 pay service may be packaged with a $10 upper tier

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[13] See Areeda, Antitrust Law vol. IX. 222 (1991). Nor do these discount packages constitute a "tier" for purposes of rate regulation jurisdiction. Congress plainly endowed the cable operator with the flexibility to choose how to market channels, and in doing so, to determine whether such offerings are within the rate regulation reach of the statute.

so that a subscriber to the pay/tier package receives a discount of $2 off the package or, by way of other examples, a free program guide or installation at reduced or no charge. Plainly, it improves consumer welfare for cable operators to pass along the efficiencies of multiple offerings, and to otherwise stimulate full utilization of the system capacity by bringing on new customers or expanding the range of services subscribed to (and desired by) existing subscribers. These same benefits obtain in an a la carte priced system, where multiple channel discounts permit subscribers to customize their cable services to their specific preferences while still being offered the efficiencies of joint distribution. Packaging cable services and goods is no less benign than such practices readily identified in other retail businesses, such as season tickets, "buy-one-get-one-free" or penny sales. As the Commission recently recognized:

> ...packaged offerings are commonplace in a variety of industries in which customers can purchase a number of goods in a package at a lower price than the individual goods could be purchased separately.[14]

Cable package discounts should be equally permissible unless they effectively coerce subscribers to buy through unwanted programming in order to receive desired channels.[15]

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[14] Cellular Bundling, 7 FCC Rcd. at n. 31.

[15] Of course, at some point the discount may be so steep as to render the package price the equivalent of the stand-alone price, that it threatens the primary policy prohibiting tying. Steep discounts which render it irrational for any subscriber to

CONCLUSION

For the foregoing reasons, TCI submits that the Commission promulgate anti-buy-through rules which focus precisely upon the narrow target of coercion to which the section is addressed, thereby otherwise permitting a wide range of marketing approaches.

Respectfully submitted,

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buy on a stand-alone basis, should be viewed as inherently suspect, with a heavy burden on the operator in such circumstances to justify the discount. See Areeda, Antitrust Law vol. IX. 51-52 (1991). It is crucial that the Commission recognize that it cannot determine on any a priori basis what size discount is acceptable or not. This inability, however, should plainly not lead the agency to preclude all discounts.

Appendix

Proposed Rules for Tier Buy-Through Prohibitions

Insert new Subpart __ to Part 76:

76.__ (a) A cable operator may not require the subscription to any tier other than the basic service tier required by 47 U.S.C. §543(b)(7) as a condition of access to video programming offered on a per channel or per program basis.

(b) The prohibition contained in __(a) above shall apply to the pricing practices of cable operators where the effect of such prices is to coerce or require the subscriber to purchase any tier other than the basic service tier required by 47 U.S.C. §543(b)(7) in order to access video programming offered on a per channel or per program basis.